No. 03-786

IN THE

Supreme Court of the United States

EDNA L. WILLIAMS,

Petitioner,

v.

BENICORP INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether § 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a), completely preempts a state law tort claim seeking damages for an alleged delay in providing notice of a determination of entitlement to a benefit under an ERISA-governed insured health benefit plan.

Whether § 514 of ERISA, 29 U.S.C. § 1144, also preempts a state law tort claim seeking damages for an alleged delay in providing notice of a determination of entitlement to a benefit under an ERISA-governed insured health benefit plan.

STATEMENT PURSUANT TO RULE 29.6

The parent of Benicorp Insurance Company is Benicorp Financial, Inc. There is no publicly held company that owns 10% or more of Benicorp Insurance Company or Benicorp Financial, Inc.

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STATEMENT OF JURISDICTION

The district court had federal question jurisdiction over the plaintiff's claims pursuant to 28 U.S.C. § 1331 and the complete preemption effected by 29 U.S.C. § 1132. The court of appeals asserted jurisdiction over the district court's final judgment pursuant to 28 U.S.C. § 1291. The judgment of the court of appeals was entered on August 26, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution provides: "This Constitution, and the laws which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const., art. IV, cl.2. The pertinent provisions of ERISA, 29 U.S.C. § 1001, *et seq.*, are set forth in the appendix to the Petition for Writ of Certiorari. (Petitioner's Appendix "Pet. App." C at 14a-16a)

COUNTER STATEMENT OF THE CASE

Respondent, Benicorp Insurance Company ("Benicorp"), is an insurance company licensed to transact business in twenty-eight (28) states, including the state of Georgia. Benicorp sells group major medical indemnity insurance coverage to employer-sponsored groups in nine (9) states. In connection with the indemnity insurance coverage, Benicorp has no arrangements in Georgia with any selected providers to furnish or deliver healthcare services. Benicorp

has no contracts with healthcare providers in the state of Georgia. Benicorp does not select healthcare providers for its insureds' in the state of Georgia. Benicorp is not and has never operated as a health maintenance organization. Benicorp does not act in any capacity as a "gatekeeper" whereby Benicorp could make determinations regarding an insured's access to a particular healthcare provider or a particular medical procedure or treatment. Benicorp does not maintain an exclusive provider arrangement in connection with its indemnity coverage issued in the state of Georgia. Benicorp is not, and has never been, certified as a managed care entity as that term is defined at Ga. Code Ann. § 33-20A-4. Benicorp is not, and never has been, subject to the reporting requirements for managed care entities contained at Georgia Comp. R. & Regs. 120-2-8-.05. (Respondent's Appendix "Resp. App." at 2a-5a)

Petitioner, Edna L. Williams ("Mrs. Williams"), and her late husband, James Williams, were employed with Judd Publishing Company ("Judd Publishing"). Judd Publishing sponsored an ERISA employee welfare benefit plan (the "Judd Publishing Plan") which offered a group health plan to its employees. (Court of Appeals Record "C.A. Record" Vol. 2, Doc. 40, Tab 2, p. 6) Beginning in 1997, Benicorp provided group indemnity coverage for the medical and life insurance components for the Judd Publishing Plan. (Resp. App. at 3a)

Mrs. Williams alleges that on October 12, 1999, Mr. Williams was diagnosed with pulmonary fibrosis disease and his physicians recommended he undergo a lung transplant. (Pet. App. D at 18a) Mrs. Williams alleges that Mr. Williams called the Care Manager who handles claims for Benicorp, Robin Clark, and informed her that he was

going to be tested for a potential transplant. (Pet. App. B at 4a) Mrs. Williams also alleges that Ms. Clark then called Barb Rouse, the Vice President of Group Operations for Benicorp, to notify her of the potential transplant. (Pet. App. B at 4a) Mrs. Williams further claims that Ms. Rouse called Ms. Clark back the following day and informed Ms. Clark that there was no coverage for a lung transplant alone. (Pet. App. E at 26a) Mrs. Williams then states that Mrs. Clark called Trina Smith, the transplant coordinator at Kirklin Clinic where Mr. Williams was scheduled for testing for the potential transplant and informed her that Mr. Williams did not have coverage through Benicorp for the potential transplant. (Pet. App. B at 5a)

In her Petition, Mrs. Williams concedes that within days of Mr. Williams making inquiry regarding coverage for a lung only transplant, the transplant coordinator at his healthcare facility was informed that Benicorp did not provide coverage for the procedure. (Pet. at 2) Mrs. Williams also acknowledges that by October 18, 1999 (six (6) days after Mr. Williams' diagnosis), "the Alabama hospital's social worker stated to Ms. Clark that she [the social worker] would begin efforts to refer Mr. Williams to Emory University in Georgia **since there was no transplant coverage**." (Pet. at 3) (emphasis added).

Mrs. Williams claims that despite Benicorp's denial of the lung transplant benefit, Benicorp did not timely inform Mr. Williams in writing or by telephone of its denial. (Pet. App. D at 19a) There is no evidence from Mrs. Williams that she or Mr. Williams ever submitted a notice of claim or proof of loss or that they sought to invoke the claim review procedure as set forth in the Certificate Book or policy.

Mrs. Williams commenced this action in the State Court of Bibb County, Georgia under Civil Action No. 50976 naming Benicorp and others as defendants (the "Bibb County Action"). In Mrs. Williams' Complaint, she alleged state law claims of wrongful death, negligence, violation of Ga. Code Ann. § 51-1-48 (the "Georgia Statute"), tortious interference, and vicarious liability. (C.A. Record Vol. 1, Doc. 1, p. 10) On December 19, 2001, Benicorp filed a Notice of Removal to remove the Bibb County Action to the United States District Court for the Middle District of Georgia, Macon Division because all the claims related to a welfare benefit plan under ERISA. (C.A. Record Vol. 1, Doc. 1, pp. 1-7)

On April 22, 2002, Mrs. Williams amended her Complaint to add claims under ERISA. In addition to the same state law claims, Mrs. Williams alleged a claim for unjust enrichment under ERISA 29 U.S.C. § 1132(a)(1)(B) and § 1132(a)(3), and that Benicorp failed to provide Mrs. Williams copies of the plan documents upon request pursuant to 29 U.S.C. § 1024(b)(4) of ERISA. (Pet. App. D at 24a)

On October 15, 2002, Benicorp moved for summary judgment on all of Mrs. Williams' claims. (C.A. Record Vol. 2, Doc. 38, p. 1) The district court granted summary judgment in Benicorp's favor on January 15, 2003. (Pet. App. B at 3a) The district court determined that ERISA preempted Mrs. Williams' state law claims. (Pet. App. B at 9a-10a) The district court also held that no remedy was available to Mrs. Williams under ERISA because she was seeking monetary damages which did not constitute "appropriate equitable relief" provided for under ERISA. (Pet. App. B at 11a) The district court further concluded that even if Mrs. Williams could state a cause of action under ERISA, she had failed to exhaust her administrative remedies prior to bringing her lawsuit. (Pet. App. B at 21a)

On January 27, 2003, Mrs. Williams filed a Motion to Alter or Amend the Judgment (C.A. Record Vol. 2, Doc. 59, p. 1), which was denied by the district court on March 27, 2003. (C.A. Record Vol. 2, Doc. 73, p. 2) On April 25, 2003, Mrs. Williams filed a Notice of Appeal on the district court's January 15, 2003 Judgment. (C.A. Record Vol. 2, Doc. 74, p. 1)

On August 26, 2003, the court of appeals affirmed the district court's judgment. (Pet. App. A at 1a-2a)

REASONS FOR DENYING THE PETITION

This Court has answered the only question presented by Mrs. Williams' Certiorari Petition – whether ERISA preempts a state law tort claim seeking alleged damages relating to the determination of entitlement to benefits under an ERISA-governed plan. Mrs. Williams asks this Court to reverse this long-standing precedent and rule that ERISA does not preempt a state law negligence claim for an alleged breach of an implied duty of good faith and fair dealing by a purported delay in communicating an ERISA plan benefit determination.[1] By her Petition, Mrs. Williams does not challenge the correctness of Benicorp's benefit determination, rather she challenges only the timeliness in communicating that determination to Mr. Williams. (Pet. at 12-13)

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1. In her Petition, Mrs. Williams characterizes her claim as "negligence" and breach of the "duty of good faith and ordinary care." (Pet. at 5-6) Before the court of appeals, Mrs. Williams characterized her claim as based upon "Georgia's common law rules of insurance bad faith." (Brief of Appellant at 11)

In *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), this Court held that ERISA completely preempts state common law tort and contract actions asserting improper processing of claims for benefits under an insured employee benefit plan. Further, in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), this Court held that a state law claim for breach of duty of good faith and fair dealing (among other claims) arising from the termination of employment in order to avoid paying ERISA pension benefits was completely preempted by § 502(a)'s exclusivity. *Id.* at 144-45. Based upon this Court's precedent, Mrs. Williams' state common law tort claim under Georgia law is barred under the complete preemption found in § 502(a) of ERISA.

In addition, Mrs. Williams' state law claim is also preempted by operation of ERISA's express preemption provision found at § 514. Mrs. Williams' state common law tort claim is preempted under the straight-forward application of § 514 and this Court's recent ruling in *Kentucky Association of Health Plans, Inc. v. Miller*, 123 S. Ct. 1471 (2003).

There are no decisions entered by the United States Courts of Appeals that are in conflict with these legal principles as applied to the claim sought to be asserted by Mrs. Williams. The district court and the court of appeals appropriately applied this Court's well-settled legal principles in this matter.

I. Mrs. Williams' state law tort claim that seeks to provide remedies in connection with an ERISA benefit determination is completely preempted under ERISA § 502.

ERISA § 502(a)(1)(B) provides a civil enforcement mechanism for a participant or beneficiary "to recover benefits due . . . , to enforce his rights under . . . , or to clarify his rights to future benefits" under the terms of an ERISA plan. 29 U.S.C. § 1132(a)(1)(B). In *Pilot Life*, this Court held that § 502(a)(1)(B) "provides an exclusive federal cause of action" for a resolution of "a suit by a beneficiary to recover benefits from a covered plan." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 62-63 (1987) (citing *Pilot Life*, 481 U.S. at 56). The federal cause of action completely preempts any state law claim that seeks to provide different or additional remedies in connection with a benefit determination. This is so, the Court explained in *Pilot Life*, because § 502(a)(1)(B) is part of a:

> comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. 'The six carefully integrated civil enforcement provisions found in § 502 (a) of the statute as finally enacted . . . provide strong evidence that Congress did *not*

> intend to authorize other remedies that it simply forgot to incorporate expressly.'

Pilot Life, 481 U.S. at 54 (quoting *Mass Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985)) (emphasis in original).

The Court in *Pilot Life* applied this rule to hold that § 502(a)(1)(B) completely preempted state common law tort and contract actions asserting improper processing of a claim for benefits. The Court recognized that permitting such claims – which would have allowed the plaintiff to recover consequential damages not authorized under ERISA – would upset the careful remedial balance struck in ERISA § 502(a). *Id.* at 50, 54. The Court's critical point was that ERISA § 502(a)(1)(B) must completely preempt state law claims and remedies that are different from the specific claims and remedies that Congress decided to make available in actions relating to benefit determination because state law claims and remedies would disrupt ERISA's comprehensive and uniform system of benefit regulation.[2]

The Court has repeatedly affirmed the analysis adopted in *Pilot Life* and *Metropolitan Life*. In *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), the Court unanimously concluded that state law tort claims for breach of duty of

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2. In *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), in a unanimous decision decided the same day as *Pilot Life*, this Court held that § 502(a)'s preemptive power is sufficient to confer federal jurisdiction over all claims within its scope, including claims plead exclusively under state law. The Court held that *Pilot Life* preemption was sufficient to confer removal jurisdiction. Section 502(a) preempts so completely that it has displaced any parallel state law cause of action, rendering such claims "necessarily federal in character" and sufficient to invoke federal jurisdiction. *Metropolitan Life*, 481 U.S. at 67.

good faith and fair dealing, wrongful discharge and breach of contract were completely preempted by § 502(a)'s exclusivity. *Id.* at 144-45. The Court held that the Texas state law claims for tortious breach of the duty of good faith and fair dealing, wrongful discharge and breach of contract had "patently violate[d]" the uniformity mandated by § 502(a). The Court recognized the conflict in permitting a plaintiff to pursue state law claims for compensatory and punitive damages rather than the recovery of pension benefits and held that ERISA § 502(a) was the exclusive avenue of redress. *Id.*

In *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002), the Court recently affirmed *Pilot Life's* holding that ERISA preempts state law causes of action, such as the common law claim asserted by Mrs. Williams, that "add[] to the judicial remedies provided by ERISA." *Id.* at 379. The Court emphasized such causes of action "patently violate ERISA's policy of inducing employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." *Id.* Indeed, all members of the Court agreed that if the independent review statute at issue in *Rush Prudential* had created an additional claim or an additional remedy, it would have been preempted under *Pilot Life* and its progeny. *Id.* at 379-80 ("[T]he state statute does not enlarge the claim for benefits beyond the benefits available in any action brought under [§ 502(a)]. This case therefore does not involve the sort of additional remedy exemplified in *Pilot Life*, . . . and *Ingersoll-Rand*. . . ."); *Id.* at 388 (Thomas J., dissenting) (citing *Pilot Life* for the proposition that "as the Court concedes, . . . even a state law that 'regulates insurance' may be preempted if it supplements the remedies provided by ERISA, despite ERISA's savings clause. . . .").

Mrs. Williams seeks to impose state common law tort liability upon Benicorp for allegedly failing to notify Mr. Williams in a timely manner of Benicorp's benefit determination. By her state law claim, Mrs. Williams seeks to challenge under state law the alleged actions of an ERISA fiduciary (Benicorp) in making and communicating an ERISA benefit determination. Mrs. Williams unmistakably seeks to assert a claim for an additional remedy contrary to both § 502(a) and this Court's pronouncements. Her purported state law claim plainly falls within the scope of § 502(a)(1)(B). Specifically, under § 502(a)(1)(B) Mr. Williams could have brought a claim "to clarify his rights to future benefits under the terms of the plan." If Mr. Williams had any question or concern regarding his entitlement to benefits under the Judd Publishing Plan, ERISA § 502(a)(1)(B) provided him an express remedy.[3]

In her Petition, Mrs. Williams argues that recent decisions involving health maintenance organizations and managed care raise a question regarding the application of ERISA complete preemption principles to this case. Mrs. Williams' argument is misguided for at least two reasons. First, Benicorp is a medical indemnity insurer not a managed care entity. Benicorp performed no "gatekeeper" function in connection with Mr. Williams' medical care. In fact, Mrs. Williams acknowledges that Mr. Williams' health care providers understood that he lacked insurance

3. The Department of Labor's new claims procedure regulations underscores that the benefit determination process is an integral part of the claims administration for health and disability plans. *See* 29 C.F.R. § 2560.503-1 (2003). Imposing a patchwork of state law regulation and claims related to the manner and method of communicating benefit determinations would run afoul of ERISA's administrative and civil enforcement mechanisms.

coverage under the Judd Publishing Plan for a lung only transplant and, consequently, sought other financing for the procedure. (Pet. at 3) Second, this case does not raise the issue of "treatment" versus "eligibility" sometimes found in claims concerning managed care entities. There is no issue present in this case that Benicorp in any way influenced Mr. Williams' medical care. In this matter, there is no tension between state negligence law in the health care area and ERISA preemption of matters relating to the administration of ERISA plan benefits. For these and other reasons, there is no reason for the Court to defer ruling on this Petition during the pendency of the Court's consideration of cases involving questions of managed care and medical treatment. *See, e.g., Roark v. Humana, Inc.*, 307 F.3d 298 (5th Cir. 2002), *cert. granted*, 72 USLW 3007, 72 USLW 3299, 72 USLW 3307 (U.S. November 3, 2003) (No. 02-1845).

Numerous circuits have had no difficulty applying the Court's principles to recognize that state law claims related to alleged delay in the administration or determination of ERISA plan benefits are completely preempted under the scope of Section 502(a) of ERISA. *See, e.g., Pryzbowski v. U.S. Healthcare, Inc.*, 245 F.3d 266, 273-75 (3d Cir. 2001) (State law claims for alleged delay in approving benefits falls squarely within ERISA's administrative function and are completely preempted. The plaintiff could have sought an injunction under Section 502(a), thereby using the provisions of the civil enforcement scheme provided by Congress.). *Cicio v. John Does 1-8*, 321 F.3d 83, 94-96 (2d Cir. 2002) (state law claims alleging failure to timely conduct an appeal of a denial of benefits are completely preempted under ERISA as having an effect on the primary administrative functions of benefit plans and within the scope of § 502(a).), *petition for cert. filed on other grounds*, 74 USLW 3093 (U.S. July 11, 2003) (No. 03-69).

II. Mrs. Williams' state law tort claim relates to an ERISA welfare benefit plan and is also preempted under ERISA Section 514.

ERISA supersedes any and all state laws relating to employee benefit plans pursuant to 29 U.S.C. § 1144. ERISA was enacted to provide a comprehensive federal regulatory scheme for employee benefits. *Pilot Life*, 481 U.S. at 44. Thus, ERISA was intended to prevent patchwork enforcement by the various states by providing an express preemption provision that ERISA "shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). This Court has repeatedly noted that this preemption provision is "conspicuous for its breadth." *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990). In fact, ERISA's comprehensive civil enforcement scheme "would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." *Id.* at 54. Congress therefore consciously included in ERISA a conspicuously broad and deliberately expansive preemption provision. *Pilot Life*, 481 U.S. at 46, 51-57; *see also Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64-67 (1987); *FMC Corp.*, 498 U.S. at 58; *Ingersoll-Rand*, 498 U.S. at 138-39.

ERISA's preemption provision states in relevant part that ERISA "supercede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). The Court has emphasized that Congress used the words "relate to" "in their broad sense, rejecting more limited pre-emption language that would have made the clause 'applicable only to state laws relating to specific subjects covered by ERISA.'" *Ingersoll-Rand*, 498 U.S. at 138 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983)). Congress

intended, through the enactment of ERISA, that the field of employee benefit plans be "exclusively a federal concern." *Alessi v. Raybestos - Manhattan, Inc.*, 451 U.S. 504, 523 (1981).

The preemptive scope of ERISA is then limited by the savings clause found at 29 U.S.C. § 1144(b)(2)(A) which provides ". . . nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities." The scope and application of the savings clause was most recently addressed by this Court in *Kentucky Association of Health Plans, Inc. v. Miller*, 123 S. Ct. 1471 (2003). In *Kentucky Association*, the Court ruled that in order to survive ERISA preemption under the savings clause, the state law must:

> "be specifically directed toward entities engaged in insurance[4]; and

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4. In *Kentucky Association*, the Court discarded the three-factor McCarran-Ferguson test and developed a two-prong test. The new two-prong *Kentucky Association* test significantly borrows from the factors under the prior McCarran-Ferguson test. This Court transformed the McCarran-Ferguson factors into a new test in order to clarify what requirements must be met in order for the savings clause to apply. This Court made clear that the savings clause analysis was being changed to provide clear guidance to lower courts. 123 S. Ct. at 1478-79.

The first prong under the *Kentucky Association* test is substantially identical to the third factor under the McCarran-Ferguson test, which was "whether the practice is limited to entities within the insurance industry." The first prong under *Kentucky Association* is whether the law is "specifically directed toward entities engaged in insurance. . . ." *Id.* at 1479. Both inquiries focus on whether the law is directed toward entities in the insurance industry. Thus, cases interpreting the third factor in McCarran–Ferguson are instructive and provide guidance as to the first prong of the *Kentucky Association* test.

> "substantially affect the risk pooling arrangement between the insured and insurer."[5]

123 S. Ct. at 1479.

a. Mrs. Williams' tort[6] claim is not saved by the ERISA savings clause.

Mrs. Williams' negligence claim is not saved from ERISA preemption under the savings clause because it does not satisfy either of the two requirements of *Kentucky Association*. First, it is derived from common law and, thus, not specifically directed to insurance entities. Second, it does not substantially affect the risk pooling arrangement between an insured and insurer. For either of these reasons, Mrs. Williams' negligence claim cannot be saved by the ERISA savings clause.

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5. The second prong under the *Kentucky Association* test is substantially similar to the first factor of the McCarran-Ferguson test. The first factor under McCarran-Ferguson is "whether the practice has the effect of transferring or spreading a policyholder's risk." *Id.* at 1478. The second prong under *Kentucky Association* is whether the law "substantially affect[s] the risk pooling arrangement between the insurer and insured." *Id.* at 1479. Due to this similarity, prior cases under the McCarran-Ferguson test provide guidance as to application of the second prong under the *Kentucky Association* test.

6. Prior to her Petition, Mrs. Williams also characterized her common law claim as a "bad faith" cause of action. Though the cited authority remains the same, Mrs. Williams now categorizes the Georgia common law as a negligence claim. Regardless, the analysis under *Kentucky Association* is unaltered.

b. Mrs. Williams' state law claim is not specifically directed to insurance companies because it derives from general common law tort and contract principles.

It is well established that a state law must be "specifically directed toward" the insurance industry in order to fall under ERISA's savings clause; laws of general application that have some bearing on insurers do not qualify. *Pilot Life*, 481 U.S. at 50; *see also Rush Prudential*, 536 U.S. at 366; *FMC Corp.*, 498 U.S. at 61.

This Court in *Pilot Life* held that when a state bad faith law has developed from general principles of contract and tort law, it is not specifically directed to the insurance industry. The Court stated:

> A common-sense view of the word "regulates" would lead to the conclusion that in order to regulate insurance, a law must not just have an impact on the insurance industry, but must be specifically directed toward that industry. Even though the Mississippi Supreme Court has identified its law of bad faith with the insurance industry, the roots of this law are firmly planted in the general principles of Mississippi tort and contract law. Any breach of contract, and not merely breach of an insurance contract, may lead to liability for punitive damages under Mississippi law.

481 U.S. at 51. Because all contracts were subject to bad faith claims, the law was not specifically directed to the insurance industry.

An analysis of Mrs. Williams' claim and Georgia law reveal that her purported claim is not "specifically directed" to the insurance industry but rather is the type of common law found to be preempted in *Pilot Life*. A review of Georgia law establishes that Mrs. Williams' claim is based upon general principles of contract and tort law, including breach of the implied duty of good faith and fair dealing which is applied to classes of contracts.

Generally, there is no tort from a breach of contract. *Briarcliff v. Kelley*, 31 S.E.2d 586, 590 (Ga. 1994). *Thomas v. Phoenix Mutual Life Ins. Co.*, 236 S.E.2d 510, 552 (Ga. Ct. App. 1977); *American Oil Co. v. Roper*, 14 S.E.2d 145, 148 (Ga. Ct. App. 1941). However, it is well settled in Georgia that "certain classes" of contracts create a special relationship for which the law then imposes a duty in tort. *Thomas*, 236 S.E.2d at 552. The Georgia Supreme Court held that "[o]nly where such contracts create a legal duty or a relation from which the law implies duties will the breach constitute a tort." *Briarcliff*, 315 S.E.2d at 590; *see also Mimbs v. Commercial Life Ins. Co.*, 832 F. Supp. 354, 359-60 (S.D. Ga. 1993). Even the case of *Hub Motor Co. v. Burdakin*, 386 S.E.2d 854, 855-56 (Ga. Ct. App. 1989), cited by Mrs. Williams, recognizes that in special circumstances a tort will rise from a breach of contract. The Georgia Court of Appeals enunciated this common law rule quite clearly in *American Oil*:

> There are certain classes of contracts which create a relation from which the law implies duties, a breach of which the law implies duties, a breach of which will constitute a tort, and 'in such cases an injured party may sue either for breach of the contract or in tort' for breach of the implied duty.

> This rule applies in certain contractual relations between principal and agent, bailor and bailee, attorney and client, physician and patient, carrier and passenger or shipper, master and servant, and similar well-recognized relations; but it is not every contractual relation which involves a public duty, the breach of which will support an action in tort.

14 S.E.2d at 148; *see also Manley v. Exposition Cotton Mills*, 170 S.E. 711, 711 (Ga. Ct. App. 1933). In *Mauldin v. Sheffer*, 150 S.E.2d 150, 155 (Ga. App. 1966), the Georgia Court of Appeals similarly noted that the law imposes upon "persons of professional standing" an obligation to exercise a reasonable degree of care "such as is ordinarily exercised under similar conditions and like circumstances by persons employed in the same or similar professions." *See also Kaiser Aluminum & Chemical Corp. v. Ingersoll-Rand Co.*, 519 F.Supp. 60, 69 (S.D. Ga. 1981) (Under Georgia law, "professional" relationships can give rise to a duty which exceeds the bounds of the contract itself.); *Howard v. Central of Georgia Ry. Co.*, 71 S.E. 1017 (Ga. App. 1911).

The "professional" implied duty upon which Mrs. Williams' bases her negligence claim arises from common law tort principles. "[T]he duty of the insurance company to use ordinary care and good faith in the handling of a claim against its insured arises out of the relationship between the insurer and the insured created by the contract or policy of insurance. . . ." *Francis v. Newton*, 43 S.E.2d 282, 284 (Ga. Ct. App. 1947). The duty of good faith arises out of the relationship of the insured and insurer. *Metropolitan Property & Casualty Ins. Co. v. Crump*, 513 S.E.2d 33, 34 (Ga. Ct. App. 1999). Where there is no privity of contract or special

relationship, then no action for negligence or bad faith against the insurer may be brought. *Francis*, 43 S.E.2d at 284. It is clear, then, that under Georgia law the negligence claim alleged by Mrs. Williams derives from common law. Numerous professionals share the same "special" contractual relationship in which duties are implied. To be sure, the tort of negligence is of general application and not specifically directed to insurance companies.

In *Moffett v. Halliburton Energy Services, Inc.*, 291 F.3d 1227 (10th Cir. 2002), the Tenth Circuit recently addressed such "special relationships" within the context of ERISA's savings clause. Akin to Mrs. Williams, the plaintiff contended that Wyoming's state law "tort of insurance bad faith" was specifically directed towards the insurance industry and, as such, saved from preemption. Citing this Court's holding in *UNUM Life Ins. Co. v. Ward*, 526 U.S. 358 (1999), the plaintiff argued that Wyoming's "tort of insurance bad faith" law was tantamount to California's notice-prejudice rule.[7] The Tenth Circuit disagreed, noting that while the Wyoming tort-based claim may be more narrowly applied than Mississippi's law of bad faith in *Pilot*, it did not "home in" on the insurance industry alone as does California's notice-prejudice law. Like Georgia, Wyoming recognizes "special relationship" torts outside of the insurance context:

> Those limited circumstances include employment cases where a 'special relationship' exists between the employer and the employee, and insurance cases. The Wyoming Supreme Court has noted that [a] special relationship is also an element of

7. California's notice-prejudice rule provided that an insurer must prove prejudice from an insured's failure to give timely notice of a claim in order to enforce its proof-of-claim requirements.

> a tort-based claim in the insurance context, which automatically exists by virtue of the unequal bargaining power the insurer has over an insured.

Moffett, 291 F.3d at 1236 (quoting *Scherer Constr., LLC v. Hedquist Constr., Inc.*, 18 P.3d 645, 652 (Wyo. 2001) (internal citations omitted). Recognizing that its roots were in the general principles of tort and contract law, the Tenth Circuit concluded the "tort insurance of bad faith" is not unique to the insurance industry; rather, it is unique to those settings in which a "special relationship" exists, including the insurance and employment contexts. *Id.*

Since *Pilot Life*, lower courts have repeatedly recognized that state common law and statutory bad faith and negligence claims against insurers are not saved from preemption under ERISA as such laws are not specifically directed to the insurance industry. *See, e.g., Cannon v. Group Health Service of Okla., Inc.*, 77 F.3d 1270, 1275 (10th Cir.), *cert. denied*, 519 U.S. 816 (1996) (state law negligence claim does not specifically regulate insurance company within the meaning of ERISA's savings clause); *Hogan v. Kraft Foods*, 969 F.2d 142, 144-45 (5th Cir. 1992) (state law claims for negligence and breach of duty of good faith and fair dealing do not specifically regulate insurance, banking, or securities and are thus not protected under ERISA's savings clause); *Bast v. Prudential Ins. Co. of America*, 150 F.3d 1003, 1008 (9th Cir. 1998), *cert. denied*, 528 U.S. 870 (1999) (breach of good faith claim brought under the Washington Insurance Code is not exempt under ERISA's savings clause); *Powell v. Chesapeake & Potomac Tel. Co. of Va.*, 780 F.2d 419, 423-24 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986) (Virginia's implied covenant of good faith and fair dealing does not bear upon the "business of insurance" within

contemplation of ERISA's savings clause and thus is not saved from preemption).; *Gilbert v. Alta Health & Life Ins. Co.*, 276 F.3d 1292, 1296-98 (11th Cir. 2001) (Alabama statute governing insurer bad faith refusal to pay preempted under ERISA as statute had its roots in general principles of tort and contract law.); *Walker v. Southern Co. Serv., Inc.*, 279 F.3d 1289, 1292-94 (11th Cir.), *cert. denied*, 123 S. Ct. 111 (2002); *see also Kelley v. Sears Roebuck & Co.*, 882 F.2d 453, 456 (10th Cir. 1989); *Caffey v. UNUM Life Ins. Co.*, 302 F.3d 576, 582 (6th Cir. 2002); *Howard v. Coventry Health Care of Iowa, Inc.*, 293 F.3d 442, 446-47 (8th Cir. 2002); *Pryzbowski v. U.S. Healthcare, Inc.*, 245 F.3d 266, 270 (3d Cir. 2001). Mrs. Williams has not presented any authority supporting a different result under Georgia common law. Whether characterized as bad faith, breach of implied duty of good faith or negligence, Mrs. Williams' claim derives from Georgia's common law and, thus, cannot be saved from ERISA preemption.

c. Mrs. Williams' negligence claim does not substantially affect the risk pooling arrangement between the insured and insurer.

Mrs. Williams' negligence claim is not saved from preemption because it does not substantially affect the risk pooling arrangement between the insured and insurer. Indeed, the state law claim does nothing to allocate or affect the risk between the insured and insurer.

Several circuits have recognized that bad faith and negligence claims do not have the effect of transferring or spreading policyholder risk. *See Gilbert*, 276 F.3d at 1298-99; *Walker*, 279 F.3d at 1293; *compare Kelley v. Sears, Roebuck Co.*, 882 F.2d 453, 456 (10th Cir. 1989) (Colorado's

common law of bad faith neither spreads policyholder risk nor controls the substantive terms of the insurance contract); *Howard*, 293 F.3d at 447, ("[t]he law of bad faith does not effect a spreading of policyholder risk or define the terms of the relationship between the insurer and the insured."). This conclusion is directly supported by this Court's analysis in *Pilot Life*, where the Court ruled that Mississippi's bad faith law did not operate to spread policyholder risks. *Pilot Life*, 481 U.S. at 50, 107 S. Ct. at 1554. Because possible state law bad faith liability does not transfer or spread policyholder risk, such state law can not be found to substantially affect the risk pooling arrangement between the insured and the insurer.

Moreover, in *Smith v. Jefferson Pilot Life Ins. Co.*, 14 F.3d 562 (11th Cir.), *cert. denied*, 513 U.S. 808 (1994), the Eleventh Circuit held that a Georgia statute governing notice of termination of coverage to an insured was preempted under ERISA. In that ruling, the court recognized that such an obligation (not dissimilar to the purported notice obligation Mrs. Williams seeks to impose on Benicorp) did not have the effect of transferring or spreading policyholder risk. *Id.* at 569. As such, a purported common law notice obligation could not be found to substantially affect the risk pooling arrangement.

Since the ruling in *Kentucky Association*, other courts have found that bad faith and negligence claims do not substantially affect the risk pooling arrangement. *See Kidneigh v. UNUM Life Ins. Co of America*, 345 F.3d 1182, 1187-88 (10th Cir. 2003); *Ercole v. Conectiv and Coventry Health Care of Delaware, Inc.*, No. Civ. A. 03-186 GMS, 2003 WL 21104926 (D. De. May 15, 2003); and *McGuigan v. Reliance Standard Life Ins. Co.*, 256 F. Supp.

2d 345, 348 (E.D. Pa. 2003) (E.D. Pa. April 9, 2003). In *Ercole*, the court stated that:

> There can be little dispute that the Delaware state bad faith cause of action does not substantially affect risk pooling between insurer and insured. Rather, it simply provides extra-contractual damages not permitted by ERISA.

2003 WL *6. Such common law claims, whether cast as bad faith, breach of implied duty or negligence merely seek to provide extra-contractual damages for an insurer's conduct in a benefit determination and do not substantially affect the risk pooling arrangement between the insurer and insured.

Mrs. Williams' state law claim, like those addressed in other circuits, does not substantially affect the risk pooling arrangement. The claim simply provides an insured a claim for extra-contractual damages. Therefore, Mrs. Williams' state law claim cannot satisfy the second prong of the *Kentucky Association* test and, as such, is not saved from ERISA preemption.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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